Edition No. 1 January - March 1998

# Land Use Manager



## Land Court Looks At Common Driveways

The Land Court has not looked favorably upon the use of land for a common driveway where the zoning bylaw does not expressly authorize such use. In Litchfield Company, Inc. v. Board of Appeals of the City of Woburn, Misc. Case No. 199971 (August 5, 1997), a landowner argued that a common driveway was a permitted use because the zoning ordinance did not require that driveway access to a lot must come directly from the legal frontage of a lot. The landowner also argued that there was no prohibition in the zoning ordinance against the use of land for a so-called common driveway. The city maintained that the zoning ordinance did not provide for common driveways and noted that the ordinance specifically stated that a use of land not specified in the ordinance is not permitted.

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Judge Lombardi came to the conclusion that if the intent was to permit residential driveways to access streets from lot lines other than the front one, the ordinance could have been so written. In the absence of such a regulation, the provision in the zoning ordinance stating that a use of land not specified in the ordinance is not permitted prevented the use of land for a common driveway. In his decision, Judge Lombardi noted that he was aided in his interpretation by provisions contained elsewhere in the ordinance. The city had also enacted regulations concerning the design and layout of required parking facilities. The ordinance specifically required a minimum width for entrance and exit driveways. It also defined a "Lot Line, Front" as the line separating a lot from the right-of-way of a street. With no other provisions addressing the question of the proper location of a residential driveway, Judge Lombardi considered

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the previous noted regulations significant. He concluded that the drafters of the ordinance had clearly indicated that a driveway for residential land use had to have a certain width measured from the front lot line.

In RHB Development, Inc. v. Duxbury Zoning Board of Appeals, Misc. Case No. 237281 (September 19, 1997) a landowner wished to construct a common driveway. RHB argued that access over another lot was permissible because the definition of "frontage" contained in the zoning by-law did not explicitly require that each lot must access over its own frontage. They brought to the court's attention the fact that the Town had failed to pass an amendment to its zoning by-law which would have explicitly required that lots could only be accessed from frontage. RHB also argued that zoning by-laws in nearby communities required that lots be accessed from their frontage. Judge Green found these arguments unpersuasive and responded that rather than looking solely at the definition of frontage, the question of whether a common driveway is a permitted use must be considered in the context of the by-law as a whole.

In reviewing the by-law, Judge Green concluded that "it strains credulity past the breaking point to suggest that common driveways are permitted as an accessory use to a residential use, as a matter of right and without limitations, where (i) such a common driveway is not expressly authorized anywhere in the by-law, (ii) accessory uses to a residential use are required to be 'on the same lot,' (iii) common driveways for 'cluster' developments require a special permit and are limited to serving no more than two dwellings, and (iv) driveways serving as part of mandated parking facilities are required to be on the same lot."

In this case the court footnoted a previous edition of the Land Use Manager where we concluded that a common driveway is a use of land which must comply with the zoning by-law. We also noted that if the local zoning by-law remained silent relative to the use of land for a common driveway, the zoning enforcement officer would have to make a determination whether a common driveway would be an allowable accessory use. In order to make this interpretation we believe, as a minimum, each lot would have to have access over its own frontage. Communities enact minimum frontage requirements to control access to the lot and to regulate density.

In 1967, the Legislature ordered the Legislative Research Council to study and investigate the feasibility and implications of restricting the zoning power of municipalities with particular emphasis on the possibility that smaller communities were utilizing their zoning power in an unjust manner with respect to minority groups (see 1967 Senate Bill No. 933). The Legislative Research Council undertook such a study and reported its findings to the Legislature (see 1968 Senate Bill No. 1133). In its report, the Council explained why communities enact minimum frontage requirements. Specifically, the Council found that:

> The primary purposes of such frontage requirements for residential lots are: (a) *to assure adequate access of these lots to the street which faces them*; (b) *to promote a rational pattern of* lot sizes and *dimensions with reference to* topography, *the municipal street system,* public utilities and over all municipal development; and (c)

> to supplement the population density control policy inherent in the locality's minimum lot size requirement.

The Massachusetts Supreme Court, in MacNeil v. Avon, 386 Mass. 339 (1982), was called upon to consider the constitutionality of a frontage requirement. The main question was whether a 200 foot frontage requirement for lots with three or more dwelling units was unreasonable and arbitrary. In reaching its decision the court identified some of the reasons for the enactment of lot frontage requirements.

> We make no attempt to enumerate all of the considerations that might reasonably lead the citizens of a town to conclude that such a requirement promotes the legitimate objectives of zoning. By way of example, however, we are satisfied that a multiplicity of dwelling units may reasonably be thought to increase the amount and size of firefighting equipment required to respond to fire, and to require more frontage to accommodate it than is required by a single family unit. ... The citizens of the town may reasonably have concluded that, as the number of dwelling units increases, the number of motor vehicles entering and leaving the premises and parking along the frontage also increases, creating congestion and interfering with access by emergency vehicles.

Considering MacNeil, the Legislative Research Council's report and the numerous cases dealing with the adequacy of access for the purpose of approval not required endorsement by the planning board, we believe a minimum frontage requirement is an access requirement. However, in Dunbar v. Dennis Zoning Board of Appeals, Misc. Case No. 237276 (January 8, 1998), Judge Green concluded that a residential driveway on the same lot as the principal use did not have to access over the lot's legal frontage.

In Dunbar, the landowner applied to the building inspector for a permit to construct a residence with one driveway crossing over the lot's legal frontage and a second driveway accessing from another street line to a garage at the rear of the property. The lot had a 110 feet of frontage on a public way and 25.85 feet on a private way. The by-law required a minimum "lot frontage" of fifty feet and defined "lot frontage" as "continuous portions of the street line over which automobiles have legal and physical access from the lot." The building inspector determined that the second driveway did not conform to the by-law because access was not over the legal frontage. The zoning board of appeals upheld the building inspector's decision.

Judge Green determined that neither the definition of "lot frontage" nor any other provision of the by-law required, explicitly or implicitly, that all driveways accessing a residential lot cross the lot line that serves as the lot's legal frontage, or another lot line that has more than the fifty feet of frontage. This decision is limited in scope. It is not a common driveway case. It dealt with the construction of a second driveway on the same lot as the principal use. Also, another driveway crossed over the lot's legal frontage providing automobiles with physical access from the lot.

# Lapsed Variances

The last paragraph of MGL, Chapter 40A, Section 10, presently provides that the rights authorized by a variance shall lapse if not exercised within one year of the date of grant of the variance. This lapse provision was inserted into the statute when the Legislature rewrote the Zoning Act in 1975 (see St. 1975, c. 808, s. 3). Prior to the 1975 rewrite, the zoning statute did not contain a lapse provision.

Over the years, a number of questions have arisen relative to the lapse provision. One issue is whether the existing lapse provision of the Zoning Act can reach back and affect variances that were granted under the provisions of the old zoning statute. The Massachusetts Appeals Court avoided the question in Hogan v. Hayes, 19 Mass. App. Ct. 399 (1985), but discussed the issue of the retroactivity of the lapse provision.

> The notion that variances more than one year old, and remaining unexercised by the effective date of the new statute, are destroyed wholesale by a retroactive application of section 10, would appear quite drastic, and hardly matches the text of that provision. A milder contention might take the form that section 10 should extend to cancel variances, granted well before the effective date of the new statute, which have not been exercised within a year after that date. Even that proposition might put a great and insupportable strain on the statutory language. ...
>
> In holding that the variance at bar did not lapse but on the contrary has been sufficiently availed of, we do not mean to reflect in any way upon the possibility that an old variance, long unexercised, may lose its force by reason of radically changed conditions at the locus, including changes brought about by revisions of a zoning ordinance or by-law. ...

Judge Karyn Scheier of the Land Court has concluded that old variances are subject to the lapse provision. In Alroy v. World Realty and Development Co., Misc. Case No. 230584 (December 22, 1997), a landowner owned a lot which was in full compliance with the zoning ordinance. The landowner applied for a variance to allow a single-family home to be constructed on an adjoining lot that did not meet the lot frontage and lot area requirements of the zoning ordinance. This variance was granted in 1972. Relying on that variance, the building inspector issued a building permit in 1996 for the construction of a single-family home on the lot. An abutter appealed the issuance of the building permit and the zoning board of appeals denied the appeal.

Both parties in this case agreed that the issuance of the building permit was dependent upon the continued validity of the 1972 variance. The Alroys argued that the building permit should not have been issued because the 1972 variance had lapsed. The Alroys further argued that the lapse provision should invalidate the variance either within one year from its date of issuance or within one year from the date the lapse provision took effect in the

City of Newton. Whether the existing lapse provision of the Zoning Act could be applied to the 1972 variance became an important issue because Judge Scheier determined that the variance had not been exercised. Judge Scheier agreed with the Alroy's position and ruled that:

> ... G.L. c. 40A, section 10, may be applied prospectively to the 1972 variance, allowing for exercise of the variance within one year after the effective date of The Zoning Act in the City of Newton. I find and rule that there was not sufficient exercise of the variance ... to prevent the variance from lapsing within that period. Indeed, the variance remains unexercised two and one half decades later.

In determining that the variance had not been properly exercised, Judge Scheier reviewed the Hogan case and two previous decisions of the Land Court. In Hogan, a variance had been granted which allowed the owner of two adjacent lots to divide the lots so that she could sell one lot with an existing house and garage and build a small residence on the other lot. As a result of such division neither lot complied with the zoning ordinance. It was decided that the sale of the lot with the existing house was sufficient exercise of the variance. The court noted that "... Even though the variance had not been fully carried out by actually building, we think it was sufficiently (and irrevocably) exercised."

Judge Kilborn of the Land Court, in Laberis v. Gandolfo, Misc. Case No. 205878 (July 11, 1994), held that a variance authorizing the division of a parcel of land had been exercised in a timely manner where the landowner had recorded 1) the variance, 2) the approved plan, 3) two partial releases from outstanding mortgages; and, 4) two deeds effectuating a land exchange contemplated by the variance, all within the time period before the variance would have lapsed. Judge Kilborn also found, in Buttaro v. Board of Appeals of the City of Woburn, Misc. Case No. 221206 (May 9, 1996), that three variances permitting the creation of three adjacent undersized lots had been exercised before Woburn adopted The Zoning Act. By that date 1) title to the three lots had been conveyed, 2) building permits had been issued for two of the lots; and 3) construction of a house had commenced on at least one of the lots.

In Alroy, a landowner owned two adjoining parcels. One parcel complied with the zoning ordinance (990 Centre Street) and the other parcel ( the Locus) was five feet short of the then required 80 foot frontage requirement and 254 square feet less than the then required 10,000 square foot minimum lot requirement. The zoning board of appeals granted a lot frontage and lot area variance for the substandard parcel. Within the year, both properties were conveyed to different parties. Judge Scheier determined that the variance had not been exercised.

> A common thread in *Laberis, Buttaro,* and *Hogan* which is not shared by the present case is that in the former cases, landowners were granted variances to enable each owner to subdivide one parcel into two or more nonconforming parcels, each of which was benefitted and legitimized by the variance. The transfer of any one of the parcels would not have been possible but for the variances,

> and each grantor conveyed a lot in reliance on the application of the variance to the remaining lot(s). Thus, the cases stand for the proposition that when the holder of a variance substantially changes his or her position in reliance upon the variance, it will be deemed to have been "exercised" for the purposes of G.L. c. 40A, s.10. In the present case, the variance applied only to Locus and the variance was not necessary in order [to] divide Locus from adjoining 990 Centre Street, which was in full compliance with the zoning ordinance.
>
> Further, the 1972 variance was not exercised when Locus was later conveyed .... before The Zoning Act was enacted. The mere transfer of title, without further action, was not legally significant to the validity of the variance.

Judge Scheier noted that the variance was not necessary in order to divide the Locus from the conforming parcel. If the Locus was held in common ownership with the adjoining lot at the time of the zoning change, we would suggest that the variance might have been necessary in order for the landowner to convey the conforming parcel based upon the "infectious invalidity" theory.

# Infectious Invalidity

Infectious invalidity? Honestly, we did not make this term up but it is an important concept to keep in mind. In a nutshell, you can have a lot which complies with local zoning requirements but it is not entitled to a building permit if the complying lot, when conveyed, creates a zoning violation or another lot which does not conform to the zoning by-law.

This concept was first identified in Alley v. Building Inspector of Danvers, 354 Mass. 6 (1968), where Alley tried to pull a fast one in the town of Danvers. In Alley, there were two existing lots each having a house on it. Each lot had more than the required lot area of 10,000 square feet. The two lots were divided in ownership in such a way that the front portion of each lot was left with a house on it but with less than the required area. The rear portions of the two lots were combined to make a third vacant lot under one ownership and having the required area. The zoning bylaw prohibited the reduction to an area of less than 10,000 square feet of existing house lots that conformed to the lot area requirement. The building inspector denied a building permit for the vacant lot. The court agreed that the vacant lot was not entitled to a building permit because the reduction in area of the two original house lots violated the zoning by-law.

Judge Peter Kilborn reached a similar conclusion in Bouffard v. Peabody Zoning Board of Appeals, Misc. Case No. 199217 (December 1, 1995). In Bouffard, there were three lots (lots 76,77 and 78) which were held in common ownership. Lot 76 contained 4,472 square feet and 50 feet of frontage. Lot 77 contained 2,387 square feet and 40 feet of frontage.

Lot 78 contained 2,656 square feet and 40 feet of frontage. In 1979, lots 77 and 78 were conveyed to another party. The seller of those lots retained ownership of Lot 76 and rebuilt a fire-damaged dwelling. The zoning in effect at the time of the conveyance required a minimum area of 5,000 square feet and 50 feet of frontage for a single-family lot. The zoning ordinance defined a lot as a "parcel of land ... available for use as the site of one or more buildings ... in one ownership ... ." In 1993 the building inspector denied a building permit to build a structure on lots 77 and 78 because the City's building department still considered lots 76, 77 and 78 as one lot. Judge Kilborn found the 1979 conveyance to be "infectious".

> Plaintiff concedes"[l]ot 76 became nonconforming as to minimum frontage, side yard and lot area requirements upon conveyance of Lots 77 and 78" ... in 1979 ... . Implicit in that concession is an agreement that before the conveyance ... lots 76, 77 and 78 formed a single lot.
>
> That is the position taken by the building inspector, which I find justified under the definition of "lot". That being so, the conveyance ... violated the prohibition in section 5.1.1 of the ordinance that "no lot ... shall be changed in size so as to violate the provisions of this ordinance with respect to size of lots or yards.
>
> Lots 77 and 78, together, are a conforming single family lot, if their history could be ignored. The problem for plaintiff is that the violation of section 5.1.1 cannot be ignored. It tars lots 77 and 78 according to *Alley v. Building Inspector of Danvers*, 354 Mass. 6 (1968). Lots 77 and 78 suffer from "infectious invalidity", to use the jargon.

# New Format For Land Use Manager

Were back. It has been awhile since the last publication (April, 1995). However, we plan to continue the Land Use Manager series at least on a quarterly basis. If you have an issue or question that you think can be addressed as part of a Land Use Manager please do not hesitate to drop us a line.

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# Land Use Manager



## Changing Nonconforming Uses & Structures

A nonconforming structure or use is a structure or use which was lawfully in existence prior to the enactment of the zoning regulation with which the structure or use does not comply. Since 1920, the zoning statute has contained language protecting the right to continue a nonconforming use or maintain a nonconforming structure. The court noted its concern to protect nonconforming uses or structures in Opinion of the Justices, 234 Mass. 597 (1920), where they stated that "rights already acquired by existing uses or construction of buildings in general ought not to be interfered with."

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MGL, Chapter 40A, Section 6 deals with nonconforming uses and structures. The first sentence of Section 6 prescribes the minimum zoning protections afforded nonconforming uses and structures. The second sentence provides a method whereby nonconforming uses or structures may be extended, altered or changed if a finding is made by the applicable finding authority. This sentence states that " ... nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood."

This "finding" provision has been the center of much confusion and controversy. To render the statute

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intelligible, the court, in Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987) was forced to add the words "structure or" so that the concluding portion of this sentence would read "shall not be substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

Rather than establishing their own criteria regarding nonconforming structures or uses, many communities have inserted the Section 6 finding provision into their zoning ordinance or by-law. If a zoning ordinance or by-law mirrors or refers to the Section 6 finding provision then any extension, alteration or change to a nonconforming structure or use must comply with the current provisions of the zoning ordinance or by-law.

This narrow interpretation of the Section 6 finding provision was first expressed by the court in Rockwood v. The Snow Inn Corp., 409 Mass. 361 (1991). Snow Inn was a nonconforming structure because it did not comply with the setback requirements of the Harwich zoning by-law. Snow Inn proposed a project which would have increased building lot coverage from 64,740 square feet to 85,865 square feet. The zoning board of appeals granted a special permit and Rockwood, an abutter, appealed the zoning board's decision.

The Harwich zoning by-law contained a maximum lot coverage provision restricting building coverage to no more than fifteen percent of the lot. The proposed changes resulted in the Inn exceeding the zoning by-law's lot coverage requirement. The Harwich zoning by-law mirrored the Section 6 finding provision and authorized the zoning board of appeals to grant a special permit allowing a change to a nonconforming structure provided the change would not be substantially more detrimental to the neighborhood than the existing nonconforming structure. The issue before the court was whether the Zoning Act or the Harwich zoning by-law authorized the zoning board of appeals to grant a special permit when the proposed change would not comply with existing zoning requirements.

The court decided that the zoning board of appeals exceeded its authority in granting the special permit and concluded that the Zoning Act only allows an extension, alteration or change to a nonconforming structure where:

> (1) the extension, alteration or change complies with the current requirements of the zoning by-law and,
>
> (2) there is a finding by the finding authority that the extension, alteration or change will not be substantially more detrimental to the neighborhood than the preexisting nonconforming structure.

In Cox v. Board of Appeals of Carver, 42 Mass. App. Ct. 422 (1997), the Massachusetts Appeals Court determined that the finding provision contained in the State Zoning Act does not authorize a change or extension to a nonconforming use unless the change or extension complies with the current requirements of the zoning by-law. In Cox, Commercial Design Associates operated a 22.67 acre mobile home park which contained sixty units. Commercial entered into a purchase and sale agreement to buy a 2.53 acre tract of land which was located across the street from the existing mobile home park. Commercial filed a special permit application with the board of appeals to use the 2.53 acres for eight additional mobile homes and as a beach area for all the residents of the mobile home park.

The Carver zoning by-law required a minimum of a 100 acres for the operation of a mobile home park and a special permit from the board of appeals.

The board of appeals granted the requested special permit and Patrick Cox, an abutter, appealed the decision. The court found that the board of appeals lacked the authority to grant the special permit and concluded that the Zoning Act does not authorize a change or extension to a nonconforming use unless:

> (1) the change or extension complies with the current requirements of the zoning by-law and,
>
> (2) there is a finding by the finding authority that the change or extension will not be substantially more detrimental to the neighborhood than the existing nonconforming use.

Municipal officials should review the nonconforming use and structure provisions of their local zoning by-law. You may find that your local zoning by-law severely limits the ability of a landowner to make any extension, alteration or change to a nonconforming structure. You may also find that no change or extension to a nonconforming use is permitted unless the proposed change or extension complies with the current requirements of the bylaw.

# Community Response Line

The Department of Housing and Community Development has initiated a new service for municipal officials called the Community Response Line (CRL). This new service addresses an ongoing need expressed by communities for a single point of contact on municipal assistance programs within state government. The CRL provides information and referral services to municipal officials and community leaders on local issues that state government can help address.

The CRL is designed to handle questions and requests for information on such municipal issues as economic development, planning, municipal management, and community revitalization. The CRL also provides information on funding, training and technical assistance opportunities available through the Department and other state agencies.

Callers to the CRL's toll-free number, 1-(877) CRL-DHCD or 1-(877) 275-3423, will receive either an immediate response to their question or within a short period of time a follow-up call with additional information. Assistance provided may include printed materials, community profile information, referrals to a community which has dealt with a similar issue or problem, referrals to or information from an internet site, or specific name and phone number referrals for our Department and other state programs.

Community Response Line service is available Monday through Friday from 10 a.m. to 4 p.m. Questions may also be e-mailed to: cresponse@hotmail.com.

# The 81L Exemption

Whether a plan is entitled to be endorsed "approval under the Subdivision Control Law not required" is determined by the definition of "subdivision" found in MGL, Chapter 41, Section 81L. Basically, the court has decided that this definition imposes three standards that must be met in order for a plan to be endorsed "approval not required" by a planning board.

> (1) The lots shown on the plan must front on one of the three types of ways specified in the definition;
>
> (2) The lots shown on the plan must meet the minimum frontage requirement of the zoning by-law or if there is none, twenty feet; and,
>
> (3) A planning board determination that vital access exists to each lot as contemplated by the Subdivision Control Law.

However, included in the definition of "subdivision" is the following exemption:

> ... the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one such building remains standing, shall not constitute a subdivision.

The original versions of the Subdivision Control Law, as appearing in St. 1936, c. 211, and St. 1947, c.340, did not contain this exemption. It was added in a 1953 general revision of the law by St. 1953, c. 674, s.7. The purpose of the exemption is not clear but the Report of the Special Commission on Planning and Zoning, 1953, House Doc. No. 2249, at 54, shows that the drafters were aware of what they were doing, although it does not explain their reasons. It is our guess that the legislature wanted to limit planning board involvement is such situations on the assumption that adequate access already existed to each substantial building prior to the Subdivision Control Law taking effect in the community.

Although this exemption entitles a landowner to an "approval not required" endorsement from the planning board, this endorsement does not relieve a landowner from complying with current zoning requirements. This exemption is only for the purposes of the Subdivision Control Law. In Smalley v. Planning Board of Harwich, 10 Mass. App. Ct. 599 (1980), the court noted that the recording of an "approval not required" plan showing a zoning violation does not preclude enforcement of the local zoning by-law. Later, in Citgo Petroleum v. Planning Board of Braintree, 24 Mass. App. Ct. 425 (1987), the court stated that "... just because a lot can be divided under this exception does not mean that the resulting lot will be buildable under the zoning ordinance." Owners of such lots may have to obtain a variance or buy abutting land to bring the lot or structure into compliance with the zoning by-law.

To assist individuals who, in good faith, processed plans before the planning board and subsequently made conveyances, obtained building permits and obtained mortgages, the Town of Westport recently enacted the following zoning provision to deal with the 81L exemption.

> Any lot shown on a recorded plan which has been endorsed by the Planning Board under General Laws, Chapter 41, Section 81P because the plan depicted a division of land on which two or more substantial buildings were standing when the Subdivision Control Law went into effect in the Town into separate lots, on each of which one such buildings remained standing on the date the plan was endorsed, shall hereafter be treated for all purposes hereunder as a lawful, pre-existing non-conforming lot. No such lot shall hereafter be changed to create a new violation of any provisions of these By-laws, or increase or change an existing non-conformity with these By-laws.

Although the above provision appears only to address lot nonconformity and is silent on other types of zoning irregularities, amending your zoning by-law to deal with the 81L exemption makes a lot of sense to us.

# Hiring Outside Consultants

Chapter 593 of the Acts of 1989, "An Act Relative to the Establishment of Special Accounts for Certain Municipal Boards", amended the municipal finance laws by adding to MGL, Chapter 44 a new Section 53G. This section of the General Laws authorizes planning boards, zoning boards of appeals, special permit granting authorities and boards of health to establish special accounts for the collection and expenditure of reasonable review fees. These review fees are for the hiring of outside consultants to assist the applicable municipal board in reviewing a proposed project. These review fees are paid by the applicant.

Prior to this legislation, municipal boards had the authority to collect reasonable review fees but these fees had to be deposited into the municipality's general fund. A municipal board could not expend review fees without an appropriation by town meeting or city council. Section 53G only authorizes the expenditure of funds for outside consultants. Communities can still charge review fees to cover the cost of municipal employees involved in the review process but these fees must be deposited into the general fund.

Section 53G does not authorize conservation commissions to establish a special account for the collection and expenditure of review fees. However, recently the Legislature enacted Chapter 10 of the Acts of 1998 authorizing the town of Burlington's conservation commission to collect and expend reasonable review fees in accordance with Section 53G. We think all conservation commissions as well as site plan approval boards should have the ability to hire outside consultant pursuant to Section 53G.

# Citizen Planner Training

The Citizen Planner Training Collaborative (CPTC) was formed in 1995 for the purpose of creating a mechanism for the development and presentation of training programs to local land use officials. Represented on the Board of Directors are the Department of Housing and Community Development, University of Massachusetts, Massachusetts Federation of Planning and Appeals Boards, Massachusetts Chapter of the American Planning Association, Massachusetts Association of Planning Directors and the Massachusetts Association of Regional Planning Agencies. These agencies constitute the Collaborative. A 17 member Advisory Board assists the Board of Directors.

CPTC has delivered training to planning and zoning boards of appeals for the past three years. This initiative has generated enthusiasm among local boards, state agencies, private non-profit groups and professional planners. Recently, 416 registrants took part in the CPTC spring training programs which were offered in nine sites throughout the Commonwealth.

In the past, training for local land use officials has been provided on an irregular basis by a variety of organizations and professionals. Though often successful, such training has not achieved the scale and coordination necessary to support the approximately 6,000 officials whose statutory authority and routine decisions affect the land use, economic development and environmental conditions of their community.

Given the great demand on the time of planning and zoning board members, CPTC realizes that its training program must be focused and structured so that participants gain a clear sense of accomplishment. In this regard, the CPTC is presently in the process of developing a set of 12 core courses for local planning and zoning boards.

The CPTC has also developed its own web page titled “Help in Planning” (HIP). HIP is a clearing house of information for the Massachusetts planning community. The goal is to provide comprehensive access to state-wide planning information for citizen and professional planners. With the help of local planners and municipal officials, CPTC hopes to consolidate planning information to make finding information more efficient and effective. To get HIP, visit the CPTC web site at http://www.umass.edu/masscptc .

For more information concerning the CPTC call Gisela Walker of the University of Massachusetts Extension at (413) 545-2188, Nancy Cahill of the Massachusetts Federation of Planning and Appeals Boards at (781) 246-4681 or Don Schmidt of the Department of Housing and Community Development at (617) 727-7001 x482.

# Looking at the Land Court

The Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court are not required to follow an opinion written by a judge in the Land Court. However, we feel it is helpful for municipal officials to be aware of the Land Court's views on land use issues because a Land Court decision can still be a persuasive authority. In each edition of the Land Use Manager we will dedicate some space to highlight Land Court decisions that may be of interest to planning and zoning boards of appeal. A resource for reviewing land court decisions is the Land Court Reporter published by Massachusetts LandLaw. Landlaw's phone number is 1-800-637-6330.

## All Special Permit Zone

The Massachusetts Appeals Court, in SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101 (1984), decided that Braintree's zoning by-law which conditioned all uses in a business district on the grant of a discretionary special permit was invalid. The court concluded that an all special permit zone was inconsistent with the uniformity requirement found in Section 4 of the Zoning Act. Later, in Gage v. Egremont, 409 Mass. 345 (1991), the Massachusetts Supreme Court, in citing SCIT, noted that a zoning by-law must permit at least one use in each zoning district as a matter of right.

In Boch v. Planning Board of Tisbury, Misc. Case No. 199441 (1997); 5 LCR 16 (1997), Judge Scheier of the land Court decided that overlay districts are subject to the same test and found no merit in the Town's argument that the waterfront overlay districted adopted by the town was valid because uses exempted by Section 3 of the Zoning Act were permitted as a matter of right. Judge Scheier noted, however, that overlay districts are appropriate if they are consistent with the Zoning Act and the Constitution; their designations are not arbitrary or capricious; and they further a legitimate end of the zoning power.

## Spacing Requirement for Special Permit Use is not Spot Zoning

Only the legislative body of a community can decide what uses will be permitted within a zoning district. This is accomplished by an amendment to the zoning by-law or ordinance.

The town of Middleton's zoning by-law allowed auto repair shops by special permit provided that no such shop could be located within 2,000 feet of an existing auto repair shop. In Hammond v. Town of Middleton, Misc. Case No. 230688 (1997); 5 LCR 33 (1997), a landowner argued that the 2,000 foot spacing requirement had the effect of creating a floating zone. A floating zone is a zone where use requirements or regulations within a zoning district change without legislative action by the community.

Judge Lombardi of the Land Court decided that the 2,000 foot spacing requirement was consistent with Section 3 of the Zoning Act because it did not change the boundary line of the zoning district. He concluded that the spacing and other requirements contained in the zoning by-law put landowners on notice that the drafters of the by-law were establishing criteria for the Board of Appeals to apply in deciding whether to grant a special permit.

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# Land Use Manager

## SJC Limits Zoning Appeals



MGL, Chapter 40A, Section 17 authorizes any person aggrieved by a decision of a zoning board of appeals or a special permit granting authority to go to court to challenge the decision. Section 17 also provides that any municipal officer or board may appeal a decision of a zoning board of appeals or a special permit granting authority. Unlike an aggrieved party, the statute does not require that a municipal officer or board show that its interests have been harmed by the board's decision. Also, the statute does not specifically limit the right of appeal to any particular class of municipal officer or board.

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There are many public officers of a municipality who could be classified as municipal officers such as a police officer, firefighter, superintendent of streets and sealer of weights and measures. The court noted in Carr v. Board of Appeals of Medford, 334 Mass. 77 (1956), that it is hardly conceivable the Legislature could have intended to allow all municipal officials the right to appeal a decision of a zoning board of appeals. To interpret the statute as giving the right of appeal to all municipal officers and boards would greatly impair the effective operation of the statute. In Carr, an individual member of the city council appealed a decision of the zoning board of appeals. The court decided that the right of appeal was limited to municipal officers or boards who have duties to perform in relation to the building code or zoning. The court concluded that an individual member of a city council has no such duty and therefore is not eligible to appeal a decision of the zoning board. Later, in Planning Board of Springfield v. Board of Appeals of Springfield, 338 Mass.

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160 (1958), it was decided that a planning board clearly has such duties and is authorized to appeal the decision of a zoning board of appeals.

In Planning Board of Marshfield v. Zoning Board of Appeals of Pembroke, 427 Mass. 699 (1998), the court had the opportunity to decide whether the planning board of one community could appeal the decision of a zoning board of appeals in an adjacent community. The zoning board of appeals in Pembroke granted a special permit, variance and site plan approval for a ten-screen, 1600-seat cinema. The planning board of Marshfield appealed the board's decision. The board was concerned about traffic and the lack of parking spaces.

The court restated its position that the zoning act only allows municipal officers or boards that have duties to perform in relation to the building code or zoning to appeal a decision of a zoning board of appeals. The planning board of Marshfield did have zoning duties within the town of Marshfield. The board was the special permit granting authority regarding uses within the water resource protection district, but the court noted that water was not an issue in this case. The planning board produced no evidence that it had duties with respect to zoning in Pembroke. This fact was critical and the court concluded that Section 17 "grants standing only to those municipal boards that have duties relating to the building code or zoning within the same town as the subject land. Because the planning board has no such duties in Pembroke, it does not have standing."

# Separate Lot Protection

For many years, zoning legislation in Massachusetts has provided zoning protection for separately held substandard building lots. The first separate lot protection was inserted into the zoning statute in 1958 (see St. 1958, c. 492). Presently, MGL, Chapter 40A, Section 6, fourth paragraph provides the following separate lot protection:

> Any increase in area, frontage, width, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing zoning requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

As was noted in Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989), the purpose of the separate lot protection is to protect a once valid lot from being rendered unbuildable for residential purposes but only if there is compliance with all the statutory conditions. The Massachusetts Appeals Court first looked at the issue of when a protected lot must be held in separate ownership from adjoining land when it decided Sieber v. Zoning Board of Appeals of Wellfleet, 16 Mass. App. Ct. 901 (1983). The court found that if the lot was in separate ownership prior to the town meeting vote which made the lot

nonconforming, then the lot may be built upon for single or two-family use. The separate lot protection also requires that the lot:

(1) conformed to existing zoning when legally created, if any;

(2) has at least 5,000 square feet and fifty feet of frontage; and,

(3) is in an area zoned for single or two-family use.

In reviewing the separate lot provision, much attention has focused on the protection from future increases in minimum lot area and frontage requirements. It should be noted however, that the protection afforded separate lots by the Zoning Act also extends to future increases in minimum yard requirements. In deciding Sieber, the court upheld the construction of a single-family home on a separate lot which did not meet the current front, rear and side yard requirements of the zoning by-law. A lot that is entitled to separate lot protection and existed prior to the enactment of a zoning by-law does not have to comply with current yard requirements.

The town of Wilmington recently had special legislation approved by the Legislature which exempts the town from the separate lot provisions of the Zoning Act. Chapter 139 of the Acts of 1998, An Act relative to construction of certain dwellings in the town of Wilmington provides as follows:

> Notwithstanding any general or special law to the contrary, no dwelling shall be constructed on any lot in the town of Wilmington containing less than 10,000 square feet of land or having less than 100 feet of frontage; provided, that the planning board may authorize by special permit construction of one single family dwelling on such a lot, which does not conform with the area or frontage requirements of the zoning but which contains at least 5,000 square feet and has at least 50 feet of frontage, provided that such lot met any applicable requirements for area and frontage at the time such lot was recorded or endorsed and that such lot has not been held in common ownership with any adjacent land since the date of nonconformance with area or frontage requirements, upon a finding, after consideration of all pertinent factors, including the provisions for the disposal of waste, that construction and maintenance of a single family dwelling on such lot will be consistent with public health, safety, and welfare and without any substantial detriment to the public good.

Unlike the Zoning Act, this legislation allows the planning board to impose yard requirements in approving construction of a single family home on a grandfathered lot. It does not permit the construction of a two-family dwelling on a substandard lot. Under this legislation, a grandfathered lot loses its separate lot protection if the lot is commonly held with any adjacent land after the date the separate lot became substandard.

In the absence of state-wide legislation, this seems like a reasonable approach in dealing with the issue of separate lot protection. Local officials should contact their state

legislators if they are interested in reviewing construction on substandard residential lots in the same manner as Wilmington.

# Voting Without Attending Hearing

What happens if a member of a zoning board of appeals or special permit granting authority, who was not present at the public hearing, casts a vote which is essential to the decision?

Most state courts have allowed a member to vote though the member did not attend the public hearing (see Rathkopf, The Law of Zoning & Planning, s. 22.01, Fourth Edition). A case in support of the majority view is Family Consultation Service v. Howard, 176 N.Y.S. 2d 707 (1958), where the court found that an absent member of a board of appeals who had access to and actual knowledge of the facts and issues in the case, and who had a transcript of the public hearing available, would be qualified to vote, although not present at the public hearing. However, in Massachusetts, a member must be present at the public hearing in order to vote on the particular matter.

The necessity that a member must attend the public hearing was first expressed in Sesnovich v. Board of Appeals of Boston, 313 Mass. 393 (1943). The court, in interpreting the terms of the Boston statute, decided that since the statute required a unanimous decision of the five member zoning board in order to grant a variance, all five members had to be present at the public hearing. A public hearing must be held by a quorum of a board. That is, the same number of members necessary to make a favorable decision on a particular matter must be present at the public hearing.

In Perkins v. School Committee of Quincy, 315 Mass. 47 (1943), the applicable statute authorized a seven member school committee to dismiss a school teacher by a two-thirds vote of the whole committee. A public hearing was held by five members of the school committee. Unlike the situation in Sesnovich, a quorum of the committee was present at the public hearing. After the public hearing, six members of the committee voted for dismissal. Two of the members who voted for dismissal were not present at the public hearing. The court concluded that in order to be eligible to vote on a teacher's dismissal, the statute required that the member be present at the public hearing. However, the court noted that their decision did not imply "that under a statute or valid rule, different from the statute here involved, a reading of a stenographic report of evidence and arguments may not furnish a legally sufficient basis for a decision."

True to its word, in McHugh v. Board of Zoning Adjustment of Boston, 336 Mass. 682 (1958), the court determined that the statute allowed a member who was not present at the public hearing to participate in the decision. The Boston statute authorized a twelve member board of zoning adjustment to change a zoning district boundary line by a decision of not less than four-fifths of its members. The statute authorized a majority of the board to conduct a public hearing but required four-fifths of the board to sign the decision. A public

hearing on an application for a boundary line change was held by nine members. The written decision was signed by ten members including two members who did not attend the public hearing. The court concluded that the members who did not attend the public hearing could act and sign the decision because the statute only required a majority of the board to be present at the public hearing.

In Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983), the court decided that when a special permit granting authority is considering a special permit application in accordance with the provisions of the State Zoning Act, such proceedings are adjudicary in nature and only those members of the board who attend the public hearing are entitled to vote. In Mullin, the planning board granted a special permit for a planned unit development. Two of the members who voted to grant the special permit were not at the public hearing. Because it was decided that two members were ineligible to vote, the court concluded a new hearing and vote were required and remanded to the board for further proceedings. The planning board also argued that the special permit had been constructively granted because of the board's invalid hearing and vote. The court found that:

> A petition for a special permit will be constructively granted only when an authority fails to take final action on an application within the ninety day period ... . The board in this case did take final action by filing its initial decision with the town clerk well within the statutory period. ... The subsequent invalidation of the board's vote has no effect on the finality of the board's action.

In Mullin, the public hearing was opened and closed in one evening. It is not uncommon, however, for a public hearing to be continued for several sessions. Is a board member who missed one of the public hearing sessions still eligible to vote? The court, in Barbaro v. Wroblewski, 44 Mass. App. Ct. 269 (1998), indicated that "ordinarily the same ... members of the board who act in a judicial or quasi judicial capacity and who are to join in the decision must be present at each hearing... ."

Planning boards and zoning boards of appeals are volunteer boards. Members are citizens of the community who have family and employment that consume a major portion of their daily activity. Considering all the demands on their time, missing a public hearing is not an uncommon occurrence. If a public hearing continues for multiple sessions, the problem of maintaining the required number of voting members increases dramatically. The ability of a board to take a valid vote can be in jeapordy in situations where a board member who had attended the public hearing is unable to act or a new member joins the board after the public hearing. Boards can be faced with taking questionable votes to avoid automatic approvals and based upon the court's reasoning in Mullin, appealing the boards decision may only result in a remand.

Considering the voluntary nature of planning and zoning boards as well as the problems associated with extraordinary voting requirements, it would seem reasonable to amend the Zoning Act authorizing a majority of the board to conduct a public hearing. This process would be similar to the statutory procedures reviewed by the court in McHugh. Allowing a majority of the board to conduct a public hearing would give a member who was not

present at the public hearing, or one of the continued hearing sessions, an opportunity to vote. Before voting, a member could become sufficiently informed on the issues raised by reviewing all the evidence and information presented at the public hearing.

# Peer to Peer

Does your community have a current need for short term problem solving or technical assistance? Could you benefit from the expertise of another community that has dealt with a similar issue or problem? If so, the Department of Housing and Community Development (DHCD) can provide assistance to municipalities through its Peer to Peer Technical Assistance Program.

The Peer to Peer program taps into the varied skills and abilities of local officials by making their talents available to aid their peers in local government. Peer to Peer accomplishes this by providing small grants to municipalities. A grant of up to $850 per municipality can provide 30 hours of technical assistance.

The Peer program has provided assistance for such projects as: capital planning and budgeting, the development of personnel bylaws, grant management, economic development planning, zoning and subdivision regulation review.

To apply for Peer assistance, a municipal body writes a request letter describing a problem which they think the assistance of an official in another community could help them solve. This letter should also include the name of a suggested Peer if the community is aware of a person who could provide the requested technical assistance. The municipal body must get a vote from the Board of Selectmen supporting the request or a letter of support from the Mayor or Manager. The request letter should then be sent to the Department of Housing and Community Development.

DHCD reviews the request to ensure that the proposal (1) does not give an unfair advantage to one community over another in a competitive situation, i.e. preparing grant applications or recruiting a specific business; and (2) does not propose use of a municipal official or official from a regional planning agency who is a municipal official within the requesting community. If the letter suggests a peer, DHCD will refer to its current list of peer officials. If the suggested peer is not listed, the Department will contact the person to see if he or she would be willing to serve as a peer. If no peer is suggested, the Department will select a suitable peer from its current peer list.

For further information regarding the Peer to Peer program, contact DHCD at (617) 727-7001, ext. 445. The staff is also available by appointment to provide assistance with applications.

# Looking at the Land Court

## The Zoning Act Prohibits Site Plan Review for Child Care Facilities

The Zoning Act provides a zoning protection for child care facilities. Section 3 of Chapter 40A prevents a municipality from enacting a zoning regulation which would prohibit, or require a special permit for, the use of land or structures for the primary or accessory purpose of operating a child care facility. A municipality may, however, impose reasonable regulations concerning the bulk and height of structures, yard size, lot area, setbacks, open space, parking and building coverage.

Section 3 also contains a similar zoning protection for religious and certain educational uses. In Bible Speaks v. Town of Lenox, 8 Mass. App. Ct. 19 (1979), the court concluded that the religious and educational protection prevents a community from imposing site plan review regulations on such uses.

In Cartwright v. Town of Braintree, Misc. Case No. 236228 (1997); 5 LCR 238 (1997), the Town of Braintree had enacted zoning regulations which required site plan review for child care facilities. Judge Green of the Land Court concluded that the Zoning Act also prevents a community from enacting zoning regulations which would require a child care facility to undergo site plan review.

## Eminent Domain Taking Can Create an Unbuildable Lot

In Helmer v. Town of Billerica, Misc. Case No. 228924 (1997); 5 LCR 150 (1997), the Massachusetts Department of Public Works took, by eminent domain, a certain portion of land leaving a remaining parcel containing approximately 5, 727 square feet. At the time of the taking, the zoning bylaw required a minimum lot area of 7,500 square feet in order to construct a single family home.

The parcel had been held in separate ownership since the occurrence of the taking. Helmer was denied a building permit to construct a single family home on the parcel. Helmer argued that his parcel was entitled to protection under the Zoning Act as a grandfathered lot, because the parcel was rendered nonconforming by the eminent domain action of the Commonwealth, and not by any voluntary conveyance by a landowner. Judge Green ruled that the Zoning Act provides no such protection.

The Billerica zoning bylaw contained a provision which prohibited any reduction in a lot which would cause the remaining lot not to comply with the dimensional requirement of the bylaw. Exempted from this requirement was any reduction which was the result of an eminent domain taking or conveyance for a public purpose. This provision was not in effect in 1952 when Helmer's parcel became substandard as a result of the eminent domain action by the Commonwealth.

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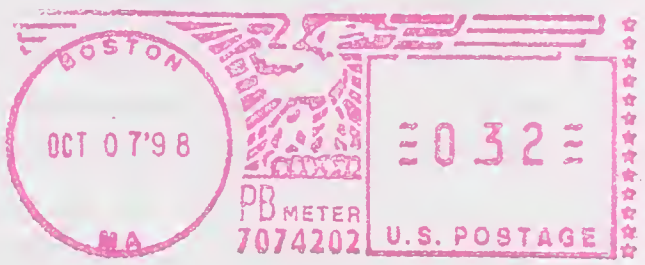


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# Land Use Manager



## Split Lot Entitled to Separate Lot Protection

MGL, Chapter 40A, Section 6, contains a separate lot protection which provides in pertinent part that "[a]ny increase in area, frontage, width, yard or depth requirements of a zoning ... by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage."

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In Boulter Brothers Construction Company, Inc. v. Zoning Board of Appeals of Norfolk, 45 Mass. App. Ct. 283 (1998), the court treated an amendment to a zoning bylaw requiring lot area to be calculated solely within the town boundaries as an increase in the bylaw's minimum lot area requirement. The Boulter Brothers owned a lot containing approximately 5 acres which was shown on a 1984 recorded plan. Of the total area, 33,401 square feet was located in the town of Norfolk and the remainder of the lot was located in the neighboring town of Millis. The portion of the lot located in Norfolk was in a residential zoning district which required a minimum lot area of 55,000 square feet. At all relevant times, the Norfolk zoning bylaw required a minimum lot area of 55,000 square feet. On November 22, 1993, the town amended its zoning bylaw requiring the Norfolk portion of the lot to meet the minimum lot area requirement. Prior to the 1993 amendment, the Norfolk zoning bylaw was silent on the question of whether land outside the borders of Norfolk could be included in calculating the minimum lot area requirement. The

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Boulter Brothers were denied a building permit and appealed the denial arguing that their split lot was entitled to the Section 6 separate lot grandfathering protection.

The court found that, prior to the 1993 amendment, the Boulter Brothers could use land in the neighboring town to meet the minimum lot area requirement since the Norfolk bylaw was silent on the question of whether land outside the borders of Norfolk could be used for the purpose of calculating dimensional requirements. The court also thought it was significant that, prior to the 1993 amendment, a lot was defined as "a parcel of land occupied or intended to be occupied by one building or use." The bylaw specifically excluded from that definition land area "within the boundaries of a street" but did not exclude land located outside the boundaries of Norfolk.

Prior to the 1993 amendment, Boulter Brothers had a buildable lot because they could use land in the neighboring town to meet the minimum lot area requirement in Norfolk. After the 1993 amendment the lot could not comply with the minimum lot area requirement in Norfolk. Since the bylaw change amounted to an increase in the minimum lot area requirement, the court concluded that lot was entitled to the separate lot protection of the Zoning Act. A similar result was reached in Schofield v. Tolosko, Misc. Case No. 153570 (1992). A zoning bylaw contained a requirement that at least 25% of the area of a lot be buildable and contiguous. The bylaw was amended by increasing the "buildable and contiguous" requirement from 25% to 50%. Judge Cauchon of the Land Court ruled that the amendment represented an increase in the minimum lot area requirement.

In deciding that the Boulter Brothers' lot was entitled to grandfather protection, the court reviewed previous decisions that have examined the split lot issue. In determining what type of activity can occur on a particular portion of a split lot, the court has made an important distinction between a passive use of land versus an active use of land. In a nutshell, when land in the more restricted zoning district is used to comply with a yard requirement or a similar dimensional requirement in the less restrictive zoning district, such passive use of land has been considered permissible in the more restricted district. When the land in the more restricted zoning district is used for an active use, such as parking or an access roadway, such active use of land has been found to be prohibited in the more restrictive zone.

For example, in Tofias v. Butler 26 Mass. App. Ct. 89 (1988), the court dealt with a split lot which was partly in a residential district and partially in a commercial district. The landowner proposed to construct a commercial structure entirely within the commercially zoned portion of the lot. The zoning ordinance contained a 20% maximum lot coverage provision which was applicable in both the commercial and residential district. An abutter argued that only the commercial portion of the lot could be taken into account when calculating lot coverage. The court disagreed and concluded that the land in the residential zone could be included when calculating lot coverage. As to the future use of the residentially zoned land that was used in determining maximum lot coverage for the commercial building, the court ruled that "... such residential land cannot be subsequently built on or counted towards the lot coverage requirement of another structure, but rather must be left as open space ... "

An example of a prohibited active use of a split lot can be found in Dupont v. Town of Dracut, 41 Mass. App. Ct. 293 (1996). In this case, Dupont sought to build a 14 unit housing project for the elderly on a lot located in both the city of Lowell and the town of Dracut. The structure would be situated on the Lowell portion of the lot where such use was a permitted use. The access and most of the required parking for the proposed use would be situated on the Dracut portion. The Dracut portion of the lot was located in a business zoning district which allowed business use and prohibited residential use. Dupont argued that the town of Dracut did not have the right to deny the use of land for parking and access to a residential facility located in Lowell because Dracut's zoning bylaw did not expressly regulate split lots.

The court noted that whether in the same or two different municipalities, if a lot is located in two different zoning districts, a town may prohibit the portion in one district from being used to serve a principal use not allowed in that district. The court ruled that while Dracut's zoning bylaw did not explicitly regulate split lots, the existence of such a provision is not determinative. The determining factor is whether the accessory use conforms to "the principle that, ordinarily, a municipality ought to be accorded the right to carry out the policies underlying its zoning ordinance or by-law with respect to the actual uses of land within its borders."

# Automatic Rescission

The automatic rescission of a previously approved subdivision plan was first discussed in Costanza & Bertolino, Inc. v. Planning Board of North Reading, 360 Mass. 677 (1971). In that case, the planning board approved a subdivision on the condition that the developer complete all roads and municipal services within a specified period of time or else the planning board's approval would automatically be rescinded. The planning board voted its approval and endorsed the plan with the words "Conditionally approved in accordance with G.L. Chap. 41, Sec. 81U, as shown in agreement recorded herewith." The agreement referred to was a covenant which contained the following language:

> The construction of all ways and installation of municipal services shall be completed in accordance with the applicable rules and regulations of the Board within a period of two years from date. Failure to so complete shall automatically rescind approval of the plan.

The court found that the Subdivision Control Law authorized the planning board to impose such a condition. The Costanza decision also noted that since the planning board's approval was conditional, the automatic rescission was not subject to the provisions of Section 81W of the Subdivision Control Law.

Heritage Park Development Corp. v. Town of Southbridge, 424 Mass. 71 (1997), dealt with the issue of whether the automatic rescission of a definitive plan under the Subdivision Control Law extinguishes the eight year zoning protection afforded land shown on an

approved subdivision plan as provided in Chapter 40A, Section 6 of the Zoning Act. Before endorsing a definitive plan, Heritage Park and the planning board executed a covenant which provided that no lot could be used or conveyed, or built upon until completion of the required groundwork. The covenant further provided that the board's approval of the plan would be automatically rescinded if the groundwork was not completed on or before March 20, 1991. In the meantime, the town of Southbridge had amended its zoning bylaw, increasing the area and frontage requirements. Under the amended bylaw, the lots shown on Heritage Park's definitive plan would be too small.

By March 20, 1991, the ground work called for in the covenant had not been completed. According to Heritage, this was due to the time required to obtain permits, a downturn in the economy, and the developer's normal rate of work on a development the size of the Heritage plan. Twenty-two months after the date of automatic rescission, Heritage appeared before the board and requested an extension of the covenant's deadline. The board denied the request. At that time Heritage raised the possibility of refiling a subdivision plan which complied with the old zoning requirements. The planning board told Heritage that any resubmitted plan would have to comply with current zoning requirements.

The court concluded that the automatic rescission of the board's approval did not deprive Heritage of the eight year zoning protection.

> "We conclude that in 1989 Heritage secured the benefits of an eight-year statutory zoning freeze for its Woodstock Heights subdivision. We conclude further that the automatic rescission of the board's approval of that subdivision did not deprive Heritage of that vested protection. ...
>
> Once a definitive subdivision plan is 'finally approved,' ... the eight-year zoning freeze is secure. Nothing in the statute suggests that the continued vitality of a freeze is coextensive with subdivision approval. We caution against confusing the rights and obligations of a planning board under the subdivision control law and its rights and obligations under the zoning laws. Whatever subdivision control the board may exercise cannot operate to deprive Heritage of the zoning protection it secured in 1989. ..."

Does a landowner have to resubmit the same subdivision plan in order to maintain the eight year zoning freeze? Although not deciding the question, the court ,in Heritage , noted that:

> "... G.L. c. 40A, section 6, ninth par., provides that a landowner may submit an amended plan or a further subdivision of all or part of the land at any time after an initial filing, and that the later submission will not constitute a waiver of a zoning freeze secured when a plan was filed initially, nor will it extend the freeze. It would be anomalous to conclude that a zoning freeze terminated where, as here, a developer must refile a plan, (perhaps the same plan) because approval of the plan was rescinded, while a developer who chooses to submit one or more different plans continues to have the protection of the zoning freeze. See *Chira v. Planning Bd. of Tisbury*, 3 Mass. App. Ct. 433, 439 (1975)."

In Chira, a landowner submitted a conventional subdivision plan and a cluster development plan to protect his land from a zoning amendment increasing the minimum lot area requirement. The court determined that both plans were not subject to the zoning amendment and that the planning board exceeded its authority in disapproving a plan because the applicant never intended to implement it.

> "Our attention is directed to nothing in the Subdivision Control Law preventing an owner from engaging in the fruitless exercise of filing subdivision plans which he intends never to utilize."

In order to maintain the eight year zoning freeze where a definitive plan has been rescinded, the Heritage decision noted that a landowner must refile a plan. In Massachusetts Broken Stone Company v. Town of Weston, 45 Mass. App. Ct. 748 (1998), the court determined that a landowner cannot just file any plan. To maintain the zoning freeze the landowner must refile the subdivision plan that triggered the zoning freeze.

> "Our courts have consistently held that the 'freeze' ... may be utilized to advance a definitive subdivision plan through the subdivision approval process, and to preserve an approved subdivision. We have been directed to no case where the use of those statutory provisions has been approved for purposes outside that process, ... . In *Heritage Park*, ... the court held that the eight - year zoning freeze inured to the benefit of the developer 'for its ... subdivision' ... . under the freeze provisions of section 6, ... it is the subdivision plan that is protected by the zoning freeze, and only incidentally, the land. The freeze attaches to existing zoning provisions which are 'applicable' to the plan, and preserves them throughout the subdivision approval process, plus an additional eight years if the subdivision plan is approved. ..."

MGL, Chapter 41, Section 81U provides that once a definitive plan has been properly submitted and until final action by the planning board is taken, the rules and regulations governing the plan will be the rules and regulation in effect at the time of the submission of the plan. If a preliminary plan is filed, Section 81U further provides that the definitive plan evolved from the preliminary plan will be governed by the rules and regulations in effect at the time of the submission of the preliminary plan. However, the definitive plan must be submitted within seven months from the submission date of the preliminary plan.

The submission of a subdivision plan can freeze existing zoning for eight years. Under the Costanza decision, an approved subdivision plan can be subject to an automatic rescission if the installation of the infrastructure and the construction of the roadways are not completed within a specified period of time. The resubmission of a rescinded plan will still have the benefit of the eight year zoning freeze but must comply with existing subdivision control rules and regulations adopted by the planning board. See Antonelli v. Planning Board of North Andover, Misc. Case Nos. 204631 and 204940 (1996); 4 LCR 67 (1996).

# Bylaw Interpretation

Once an area has been zoned for certain purposes, only those uses which are specifically allowed are permitted within the zoning district. A zoning bylaw need not be both permissive and prohibitive in form. It is a familiar principle when interpreting zoning bylaws that the express mention of one matter excludes by implication other similar matters not mentioned. If a zoning bylaw enumerates certain permitted uses and contains no express prohibition or restriction as to other uses, the uses which are not specifically authorized in a zoning district as being permitted are deemed to be prohibited,

In Leominster Materials Corp. v. Board of Appeals of Leominster, 42 Mass. App. Ct. 458 (1997), Leominster Materials Corporation (LMC) appealed the decision of the city's zoning board of appeals upholding the decision of the zoning enforcement officer. The zoning enforcement officer determined that LMC's proposed use of its land for excavation and removal of stone and general quarrying activity was not a permitted use.

The zoning ordinance expressly permitted the removal of sand, loam and gravel in all zoning districts subject to the provisions of the ordinance regulating such removal. The removal of stone and rock was not mentioned in the ordinance.

The court concluded that the absence of a general or zoning ordinance prohibiting the removal of stone within the municipality did not make such activity a lawful use.

> "Since the removal of sand, loam, and gravel is an expressly permitted use in all zoning districts, the exclusion of rock and stone removal from the list of permissible uses was presumably deliberate and not an oversight. The court cannot read into the ordinance an unexpressed exception."

# Looking at the Land Court

**Failure to Obtain Curb Cuts Does Not Constitute a Distinct Physical Impediment**

In Poulos v. Planning Board of Braintree, 413 Mass. 359 (1992), the court held that a planning board can withhold ANR endorsement where the "access implied by the frontage is illusory." The court also found that the planning board should consider the conditions which exist at the time the plan is presented and not the conditions which might exist in the future. In Poulos, the court determined that a plan was not entitled to ANR endorsement where the existence of a guardrail installed on a public way between the way and the downward slope of abutting property prevented adequate access from the way to the lots shown on the plan.

In Hobbs Brook Farm Property Company Limited Partnership v. Planning Board of Lincoln, Misc. Case No. 238655 (1998); 6 LCR 142 (1998), a landowner submitted a five lot ANR plan. All five lots had frontage along Route 2 and each lot met the minimum 120 foot lot

frontage requirement of the zoning bylaw. Four of the lots shown on the plan had a portion of their frontage obstructed by metal guardrails or concrete jersey barriers. However, each of the four lots had unobstructed frontage along Route 2 to the buildable area of the lot for the following distances: (i) lot 2 - 30 feet; (ii) lot 3 - 61 feet; (iii) lot 4 - 87 feet; and (iv) lot 5 - 22 feet. The zoning bylaw did not require that the frontage be unobstructed for the full required minimum distance of 120 feet. The planning board denied endorsement because all the lots shown on the plan did not have 120 feet of unobstructed frontage. Judge Green of the Land court ruled that access to each of the lots was sufficiently wide to allow vehicular traffic onto the lots and annulled the decision of planning board denying ANR endorsement

The planning board had also denied ANR endorsement because the petitioner had not obtained curb cut permits from the Massachusetts Highway Department for each of the lots. Judge Green ruled that it was not necessary to obtain curb cuts before endorsement of an ANR plan which shows existing unobstructed access to each lot sufficiently wide to permit passage of all types of vehicles.

## No Left Turns

In Jiffy Lube International, Inc. v. Alper, Misc. Case No. 233059 (1998); 6 LCR 268 (1998), the Winchester zoning board of appeals granted a special permit for the operation of an automotive lubrication and car wash facility. Jiffy Lube appealed one of the conditions imposed by the board which required Jiffy Lube to take all reasonable steps to ensure that vehicles exiting both the car wash and lubrication facility make right turns onto the street. The board required Jiffy Lube to erect two signs at the exit for the facility stating "Right Turn Only."

In imposing this condition, the zoning board of appeals identified concerns regarding the effects of the proposed facility on traffic conditions. The board's traffic concerns were supported by evidence. Jiffy Lube disagreed with the board's view of the degree of traffic and the condition imposed by the board to deal with that concern. Judge Green noted that the condition imposed by the board is not the only approach that the board might have taken to address the traffic issue but found that the condition falls within the board's proper range of administrative discretion. Where a special permit is denied or conditioned based upon concerns supported by the evidence and identified as a reason for the board's decision, it is the board's evaluation of the seriousness of the problem, not the judge's which will prevail.

Judge Green noted that this case was one in which reasonable people may differ both on the effects of the proposed facility on the traffic situation, and on the best means to address those effects. "In such circumstances the board's decision was not arbitrary and must prevail."

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